

Force Majeure, Now What?

April 19, 2018

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As discussed in our [last alert](#), the possibility of parties turning to *force majeure* clauses as an excuse for performance in the face of steel and aluminum tariffs has become a reality. While the government deals with numerous applications for exemptions and exclusions from the recently imposed tariffs, the number of parties that have turned to declaring a *force majeure* to excuse or delay performance has increased. As recently as last week, some of the largest players in the aluminum markets, including Swiss-based Glencore and Russian producer Rusal, have declared *force majeure* events. [1](#)

It is no surprise that Rusal decided to invoke *force majeure* one day after its largest purchaser of aluminum, Glencore, decided to do so. The number of exemptions and exceptions granted by the government (and the countries targeted with the tariffs or sanctions in the case of Russia) is certainly something to watch in the coming months, and will surely affect how severely the supply of steel and aluminum and their respective markets will be affected. And, the severity of supply shortages will certainly be a huge factor in whether *force majeure* legally applies.

However, regardless of the severity, the wave is likely coming to the United States.

Courts in most jurisdictions do not apply *force majeure* when government action affects only the profitability of a contract but does not preclude performance. The question of where this line is drawn, or how much of an economic hit a party should have to endure by performing, is what dictates the actions of that party, whether it is a legally sound decision or not. The corresponding question is how to practically deal with *force majeure* when it is invoked, knowing that a court or an arbitrator's determination of whether *force majeure* applies is likely months or years away.

Whichever side you are on, consulting with counsel (internal or external) gathering information and communicating with your contractual partner are the first steps that will dictate whether it is best for your business to take a hard line and litigate, or try to negotiate an interim solution. Is *force majeure* being invoked because performance is truly impossible, or just because performance is commercially unpalatable or impracticable? Are there adequate sources of supply available to fill the gap or cover the shortage? If performance is going to be delayed, how long will it be delayed? What are your obligations to your other customers or suppliers that may be affected?

Do your contracts have favorable *force majeure* language or escalator clauses that allow you to pass on increased costs to another party? What forum will the dispute be litigated in, and how efficient and favorable is that forum likely to be for your business interests? Is your contractual partner solvent, and will it be solvent a year from now?

If your contractual partner is using *force majeure* as an excuse to renegotiate a bad deal, and adequate supply is available elsewhere, then litigation may be a reality.

¹ For more information, click [here](#) and [here](#).